SUPREME COURT, NASSAU COUNTY
NYLJ, May 16, 1990

★ ARIELLE JENNIFER MILLER (infant) pet, v. HEWLETT-WOODMERE UNION FREE SCHOOL DISTRICT #14, res—This proceeding was brought to compel respondents to make available for inspection and copying pursuant to Section 87 of the Public Officers Law all records, minutes, statements, transcripts and recommendations relative to a decision by the Hewlett-Woodmere Union Free School District #14 which denied petitioner's request for a change of school for his daughter.

Petitioner herein is an infant under the age of 14 years appearing pro se by her father and natural guardian. The petitioner was assigned to the Ogden Elementary School ("Ogden") and it appears that the first year of attendance in the school year 1987-88 was an unhappy event. It is alleged that racial encounters with certain neighbors have spilled over into the educational setting at Ogden. It is further alleged that administrative control of the alleged racial undercurrents as well as the administration's response to the petitioner's social needs as a first-grader and universal member of the student body failed to ameliorate the situation and may have contributed to her discomfort at school.

Apparently, to relieve some of the fears about school, she was enrolled by her parents in a private school for the past two (2) academic years. However, on October 20, 1989, by a letter addressed to Dr. Bert Nelson, the Superintendent of the Hewlett-Woodmere Union Free School District #14 (the "Superintendent"), petitioner requested reassignment of the petitioner within the school district from Ogden to the Hewlett Elementary School, as soon as possible. The request made reference to the neighborhood racial issues that had extended into the school and the separate school related concerns.

Petitioner was informed that the request was denied by letter dated November 9, 1989 and signed by the Superintendent. The letter states in pertinent part:

Your requests that [the child] . . . be permitted to attend Hewlett Elementary school rather than Ogden Elementary School, the neighborhood school for which your home is zoned, have been under review. I have now received the recommendation of the instructional leadership team and write to advise you of my decision.

* * *

[A]ll of the factors which you set forth in your letter of October 20, 1989 were carefully considered. . . .

Based upon consideration of the factors you set forth, your request for [the child] to attend Hewlett Elementary School rather than Ogden Elementary School is denied at this time.

The instructional leadership team [The "instructional leadership team" was later defined to consist of the Deputy Superintendent, both elementary school principals and the principal of the Early Childhood Center.] which reviewed your request and advised me would welcome receiving additional information . . . so that they may reexamine the matter. Specifically, they have requested that [the child] meet with our chief school psychologist.

Subsequently, by letter dated November 28, 1989, petitioner sought information relative to the decision. Petitioner noted, specifically, that no reason was stated for rejecting his request for a transfer of schools for his daughter, although the Superintendent stated that he had received a recommendation from the Team. In the absence of a reason, petitioner sought the supporting Team's recommendations for the decision, or, if the decision was made at a meeting, the minutes thereof. The aforesaid letter was specific in its request for (1) a reason for the decision; and, (2) the record, and expressly made reference to New York's Freedom of Information Law (FOIL).

In response to petitioner's FOIL request, he received only a letter from the Superintendent, dated December 15, 1989, wherein it was repeated that petitioner's request had been carefully considered by the Superintendent and the instructional leadership team and restated that the request was denied. The denial was amplified only by the self-apparent statement that "The team's recommendation to me and concurring determination" were based on the fact that they had not been persuaded by petitioner to approve a transfer from the school in the child's attendance zone. No reference was made to disclosure of any documents, or a denial under FOIL.

Subsequently, petitioner brought this CPLR Article 78 proceeding to compel disclosure of the record. Respondents, in their opposition, assert that there is but a single document in question, suggest an in camera review of the document and argue that it is exempt from disclosure under Section 87, subd. 2, para. g of the Public Officers Law as an intra-agency or inter-agency record.

The issue, then, to be determined by this Court is whether the document is protected from disclosure sunder the intra-agency exemption or whether it falls within that class of documents that despite being intra-agency communications must be disclosed because they are "final agency policy or determinations" within the meaning of Public Officers Law 887 1(g)(iii). It is well to note at the outset that an exemption from disclosure has always been narrowly construed (Matter of Fink v. Leifkowitz, 47 N.Y.2d 567 (1979); Matter of Gannett Co., Inc. v. James, 87 A.D.2d 744, 447 N.Y.S.2d 751 (A.D.4th Dept. 1982) and that as a "general proposition all agency records are presumptively available to the public (Matter of Farbman & Sons v. N.Y. City Health and Hospitals Corp., 62 N.Y.2d 75, 79-80) with the burden of demonstrating that material requested is exempt from disclosure falling upon the agency." Cornell University v. City of New York Police Department, 153 A.D.2d 515, 516 (1st Dept 1989).

It is accepted that underlying the enactment of FOIL is the principle that open disclosure of government's records and the decision-making process fosters government's public accountability. P.O.L. 884. Farbman v. N.Y. City Health and Hospitals Corp., 62 N.Y.2d 75, 79-80 (1984). In counterpoise is government's need for candid self-evaluation and frank and thorough appraisal of the conflicting needs from which public offices must select one course of action. The responsibility of local governments is, in all instances, to secure unto the people the rights, powers, privileges and immunities granted to them by the Constitution of the State of New York and to make just decisions which, in their wisdom, further the desires and needs of those by whom they have been elected as their representatives in our democratic form of self-government. As a consequence, in the course of governmental affairs, incidents arise wherein the prospect of public disclosure would have a chilling effect on the candid discourse thought necessary to arrive at a reasoned decision. Matter of Gannet Co., Inc. v. James, 86 A.D.2d 744 leave to appeal den. 56 N.Y.2d 502; Sea Crest Construction v. Stubing, 82 A.D.2d 546 (A.D.2d Dept. 1981).

In recognition of this chilling effect, the Legislature provided for protection of such deliberations in Section 87, subd. 2, para. g of the Public Officers Law. However, such a concern cannot be understood to defeat the purpose of the statute; and to categorically render all intra-agency recommendations on a determinative nondisclosable. As stated in Rome Sentinel Co. v. City of Rome, 546 N.Y.S.2ds 304 (Sup. Ct. Oneida 1989), "The Court must, therefore, look to the nature of the documents being requested, on light of the presumption of access codified by the Freedom of Information Law, the practice of construing its exemptions narrowly, and its legislative history." Id. at 306.

"Predecisional memorandum" are the code words most often invoked when a public agency seeks to prevent disclosure of inter-agency or intra-agency documents. Miracle Mile Association v. Yudleson, 417 N.Y.S.2d 142 (A.D. 4th Dept. 1979). Frequently, the claim is justifiable as in the Town of Oyster Bay v. Williams, 134 A.D.2d 267 (A.D.2d Dept. 1987) where, after an in camera review, the Court prevented disclosure upon a finding that the documents consisted of opinions, advice, deliberations, . . . policy formulations . . . and were exempted as the sort of deliberative functions that were subjective and would be hindered by disclosure.

Similarly, a Freedom of Information Request by the Sentinel, a newspaper in Rome, New York for information concerning the suspension form duty of a city fireman, was treated in this manner: "The Sentinel is entitled to disclosure of the final determination in this fireman's suspension hearing without disclosing all the supporting allegations, complaint on witnesses names." (Rome Sentinel Co., 546 N.Y.S.2d at 306). The Court found that disclosure of "confidential details of charges against the fireman, as well as the hearing results and the punishment imposed," Id. at 305, was appropriate but the documents underlying the suspension were protected. The Court, thus, distinguished between agency communications concerning the fireman's misconduct prior to the final decision and final agency materials concerning misconduct that were also subjective in nature but implicit in the final determination.

And, in Scaccia v. New York State Division of State Police, 138 A.D.2d 50, 530 N.Y.S.2d 309 (A.D.3d. Dept. 1988) the Court upheld a denial of disclosure on the grounds that the "document sought represented an intermediate step leadign to a decision to proceed to a formal disciplinary hearing." (Id. at 311). The information was characterized as clearly intra-agency and predecisional, and, therefore, exempt under Public Officers Law §87(2)(g).

A distinction, then, is consistenly made by the Courts between predecisional intra-agency communications that debate a course to be set upon by the agency, and communications that debate a course to be set upon by the agency, and communications linked with the agency's final determiantion. Assuredly, the statute obliquely refers to "final agency policy or determinations," and gives no guidance as to determining at whch stage the dicussion upon which the determinations is made, becomes, itself, the agency's last or final determination, or the agency's policy. The point is that predecisional records and final agency determiantions are differentiated by more than just temporal quantum. Predecisional records imply uncertainity and subjective assessment of a host of options. A final determinations implies the documents that support a particular decision and goes to the very heart of what FOIL is about. This is because governmental bodies are most oftenheld accountable for what they do, not for what they discuss doing.

The case now before me is distinguishable from both Sinicropi v. County of Nassau, 76 A.D. 2d 832 [2nd Dept. 1980] and Matter of McAulay v. Board of Education, 61 A.D. 2d 1046, aff'd 48 N.Y. 659, in which access to documents was denied under P.L.O. 887 subd. 2, para g, iii. In Sinicropi, the Court had conducted an in camera review of the material requested and was satisfied that the documents were predecisional memoranda. Specifically, petitioner in Sinicropi sought evaluations of a public employee's work performance compiled in preparation of a disciplinary hearing. As such, the records were subjective records removed from the final determinations by the agency, doubtlessto be reached after the disciplinary proceedings.

In McAulay the documents sought were prepared for the assistance of a hearing panel entertaining an appeal from a school employee's unsatisfactory rating. The McAulay Court specifically noted as its primary concern that the public would be "mislead into believing that the ultimate decision was in fact based upon those materials." (Siniciopi, 76 A.D.2d 832, 833). Concededly, this was a worthy concern, as the occurrence of a hearing presupposes that a decision will be made on the basis of information received, in an adversarial context, and not on the prehearing memorandum complied by agency staff. On the basis of evidence gathered, the appeal was sustained bythe Chancellor, (61 A.D.2d at 1048). The McAulay COurt found dispositive the possibility that the Cahncellor may not have adopted the panel's reasoning when he made his decision.

In the matter under review, defendant has failed to meet its burden of establishing that the material sought is exempt from disclosure. Defendant has failed to specify with particularity why the document requested falls specifically within the ambit of non-final intra-agency exemptions. The circumstances in Sinicropi and McAulay are distinguishable from the matter before the Court. The Superintendent admits to replying directly on the recommendations of the Team in deciding to deny plaintiff's request for a transfer of schools within the school district. The decision was made without any intervening input from third persons. The recommendation was directly responsive to plaintiff's letter and embodies the school's final determination and policy and was intended to be the basis for the decision. It is in contrast to Scaccia, noted above, where "the document sought represented an intermediate step leading to a decision to proceed to a formal hearing," (530 N.Y.S.2d at 311), and was more "than an expression of opinion or naked argument for or against a certain position." (Dunlea v. Goldmark, 54 A.D.2d 446, 448 aff'd 63 N.Y.2d 754 [1979]). It was not an independent investigation embarked upon to determine whether to take action concerning the child's disordant first year of school, and, indeed, it is represented that the r ecord of these events is available for plaintiff's inspection upon completion of proper forms and tender of proper remittance.

On the totality of circumstances surrounding the Superintendent's decision, as present in the record befor the Court, the Court finds that petitioner is entitled to disclosure.It is apparent that the Superintendent unreservedly endorsed the recommendation of the Term, adopting the reasoning as his own, and made his decision based on it. Assuredly, the Court must be alert to protecting "the deliberative process of the government by ensuring that persons in an advisory role would be able to express their opinions freely to agency decision makers," (Matter of Sea Crest Construction Corp. v. Strubing, 82 A.D.2d 546, 549 [2d Dept. 1981]), but the Court bears anequal responsibility to ensure that final decision makers are accountable to the public. When, as here, a concord exists as to intra-agency views, when deliberation has ceased and the consensus arrived at represents the final decision, disclosure is not only desirable but imperative for preserving the integrity of governmental decision making. The Team's decision no longer need be protected from the chilling effect that public exposure may have on principled decisions, but must be disclosed as the agency must be prepared, if called upon, to defend it.

The foregoing constitutes the decision and order of the Court.